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No. 612 MISC.

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In The Supreme Court of The United States

October Term, 1957

LOUIS GLENN BALLARD,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1957

NO.

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-vs-	)
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UNITED STATES OF AMERICA,	)
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 7, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of August 13, 1957, is not reported but is copied in Appendix A, infra; and the opinion of the Court of Appeals of January 7, 1958, is as yet unreported (C. T. 3), but is copied in Appendix B, infra.

JURISDICTION

The first opinion of the Court of Appeals for the Ninth Circuit was dated and entered on August 13, 1957. Petitioner filed a petition with the Court of Appeals for Rehearing on September 5, 1957. On January 22, 1958, the Court of Appeals denied the Petition for Rehearing, meanwhile the Court of Appeals for the Ninth Circuit rendered its second opinion on January 7, 1958, and judgment was dated and entered on January 7, 1958. (Appendix C) On February 13, 1958, by order of the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, the time within which to file a petition for Writ of Certiorari was extended to and including March 21, 1958.

The jurisdiction of the Court is involved under Title 29, United States Code, Section 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

BASIS OF JURISDICTION BELOW

Petitioner was indicted by the Federal Grand Jury in the Southern District of California, Los Angeles, on May 25, 1955. The indictment contained ten counts, only three of which, Counts IV, V and VI, named

petitioner as defendant.

Count I charged a conspiracy, 18 U.S.C. 371, naming Clifford L. Duke, Jr., Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Charles W. Vosburg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Donald F. Hamm, Edward V. King and Robert Helm as conspirators with Duke the only named defendant.

Counts II and III charged a violation of 18 U.S.C. 545 against Duke only.

Count IV charged a conspiracy, 18 U.S.C. 371. The offenses, the commission of which was the object of the conspiracy, were stated to be the importation and concealment and transportation after importation of psittacine birds contrary to law. This count of the indictment alleges the conspiracy commenced in April of 1953, the date of the first overt act set forth is April, 1953, and the date of the last overt act set forth was June, 1953. The conspirators were alleged to be Clifford L. Duke, Jr., Vic Buono, petitioner Ballard, John W. Hadzima, Phyllis Hadzima, Mary Asconi, Roy Pursselley, and Robert Helm, with Clifford L. Duke, Jr., Vic Buono and petitioner Ballard the only named defendants.

Counts V and VI charged a violation of 18 U.S.C. 545 against petitioner, Duke and Buono.

Count VII charged a conspiracy, 18 U.S.C. 371, naming Duke, Buono, Robert Helm, Nicholas Spicuzza and Albert Appel as conspirators, with Duke and Buono the only named defendants.

Counts VIII, IX and X charged a violation of 18 U.S.C. 545 against Duke and Buono.

The District Court had jurisdiction of the cause under Title 18, Section 3231, which confers upon the District Court original jurisdiction of all offenses against laws of the United States.

IMPORTANT STEPS IN TRIAL COURT

On June 15, 1955, petitioner filed his notice of motion to move for a severance. (C.T. P. 42-43) This motion was heard by Judge Weinberger and in a rather lengthy opinion from the bench on June 23, 1955, Ballard's motion for severance from his co-defendants and a separate trial, and his alternative motion that the trial of counts four, five and six be separate from the trial of counts one, two, three, seven, eight, nine and ten, if he was not granted severance from his co-defendants, was denied and each motion denied. (TR. 71A, Line 3 - 80A line 9)

Petitioner filed a demand for a Bill of Particulars. (C.T. 23, 25); and affidavit of his counsel in support thereof (C.T. 21, 22) and Points and Authorities, (C.T. 26, 27) all on June 7, 1955. This was rather thoroughly argued on June 23, 1955, and partially denied. Subsequently the court denied the demand in toto. (C.T. 77)

At the conclusion of the Government's case, petitioner moved the Court for entry of judgment of acquittal as to Counts Four, Five, and Six. (TR.1889)

Petitioner moved to strike from the record all testimony of Spicuzza, Hadzima, Helm and Todd relating or purporting to relate, to Counts One, Two, Three, Seven, Eight, Nine and Ten as far as petitioner's case was concerned as not being binding against o upon petitioner, and as being prejudicial to petitioner. (TR. 1891-1892)

Petitioner made a motion for mistrial. (TR. 1893)

The Court asked if petitioner had moved for severance or separate trial. (TR. 1896) When advised petitioner had moved for severance and separate trial and that Judge Weinberger had ruled on the motion, nothing more was said. (TR. 1896-97)

All of Petitioner's motions were denied. (TR. 1930)

On September 23, 1955, the jury returned a verdict finding Duke guilty as to all ten counts, petitioner guilty as to Counts IV, V and VI, Buono guilty as to Counts VII, VIII, IX and X, and not guilty as to Counts IV, V and VI.

Petitioner filed notice of appeal to the Court of Appeals for the Ninth Circuit on October 10, 1955.

The Court of Appeals for the Ninth Circuit had jurisdiction to review the judgment of the District Cou under the provisions of Title 28, United States Code, Section 1291.

ORDERS OF THE COURT OF APPEALS

On December 26, 1955, the Court of Appeals admitted petitioner to bail pending appeal.

On November 25, 1955, the trial Court issued its order authorizing Duke to prosecute his appeal in forma pauperis, (C. T. 338) and on March 29, 1956, The Honorable Albert Lee Stephens, Acting Chief Judge of the United States Court of Appeals, for the Ninth Circuit, authorized the hearing of Ballard's appeal on the same record filed on behalf of Duke.

The Honorable Paul P. O'Brien, Clerk thereof, has certified to this Honorable Court the entire record from the United States Court of Appeals, for the Ninth Circuit.

The Court of Appeals affirmed the judgment of the District Court against petitioner on August 13, 1957 (Appendix A), and all that Court had to say about the case of petitioner was:

> "Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

"It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown."

In its second opinion of January 7, 1958, (Appendix B), the Court of Appeals affirmed the judgment of the District Court against petitioner and used the precise language quoted above except in the second paragraph of the quoted portion, there was one sentence changed as follows:

"Ballard was charged by only three of the ten counts."

QUESTIONS PRESENTED

FIRST QUESTION

Was it prejudicial error on a trial for conspiracy, where the duration of the conspiracy is established by the date of the first overt act set forth in the conspiracy charge and terminated by the date of the last overt act set forth in the conspiracy charge, to admit, over timely objection, evidence tending to show separate and distinct conspiracies independent of the charge of conspiracy contained in the indictment against petitioner, particularly after petitioner's timely and proper application for Bill of Particulars was refused by the trial court?

SECOND QUESTION

Was it prejudicial error to deny petitioner's motion for severance and separate trial when the record at the time of petitioner's motion therefor, and the ruling of the court thereon, showed that a denial of such motion would certainly result in prejudice to petitioner?

THIRD QUESTION

Was it prejudicial error to cause petitioner to be subjected to mass trial?

FOURTH QUESTION

Was petitioner lawfully convicted and punished for a violation of sections 371 and 545, Title 18, U.S.C., where the evidence does not show any violation of those sections by petitioner, but does show that petitioner

and others, entirely within the United States of America, entered into a conspiracy to rob, and did in fact, commit the crime of robbery against one who had possession of certain merchandise, and where contraband merchandise had never been in the possession of or under the control of petitioner?

FIFTH QUESTION

Was petitioner lawfully convicted when the evidence of the Government against petitioner was chiefly and almost entirely tainted evidence from tainted witnesses?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution is involved. The pertinent portions being:

> "****nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of **liberty**, without due process of law."

SUMMARY OF FACTS

John W. Hadzima was engaged in the business of smuggling psittacine birds into the United States from 1949 until a short time prior to 1955; from about 1950 to at least March of 1953, the witnesses John W. Hadzima, Nicholas A. Spicuzza and George Todd were engaged in a joint enterprise to smuggle psittacine birds into the United States from a foreign country. Hadzima testified he procured the services of Ballard,

through Pursselley in 1953, to steal birds in the United States from Spicuzza and Todd. Helm testified he told Hadzima, Pursselley, Duke, Buono and Ballard, at Buono's office, that Spicuzza and Todd were flying birds into Desert Center and that plans were made to rob and steal these birds from Spicuzza and Todd or their agents. The date the birds were to be landed was May 13, 1953. Spicuzza, Curtis, Hadzima and Helm fixed the date of the hijacking as May 13, 1953. Mary Asconi testified the birds were delivered to her aviary in Burbank, California, by Hadzima in the early morning of May 14, 1953.

On May 13, 1953, Hadzima, Pursselley and petitioner met Helm, Spicuzza and Curtis at Desert Center in Riverside County, California. The robbery took place. Petitioner Ballard was the strong arm man in the robbery. He remained at Desert Center with Spicuzza and Curtis. Hadzima and Pursselley took the birds. Hadzima later delivered them to the aviary of Asconi. The birds were later sold. Petitioner received a share of the proceeds.

The evidence on the charges against petitioner was furnished by:

John W. Hadzima, a twice convicted smuggler;

Nicholas A. Spicuzza, a twice convicted smuggler;

George Todd, a twice convicted smuggler;

Raymond Curtis, a convicted smuggler;

Robert Helm, a convicted smuggler;

Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled.

The United States Court of Appeals accepted petitioner's characterization of these witnesses.

Petitioner Ballard did not testify.

PREJUDICIAL EVIDENCE IMPROPERLY ADMITTED AGAINST PETITIONER

1. Thomas E. Johnson, Deputy Sheriff of San Diego County, testified that petitioner was arrested by him on or about February 20, 1953, in San Diego County, first for speeding and suspicion, and that he turned the petitioner over to United States Customs Officers because he had crates of parakeets in his truck, and that thereafter, petitioner Ballard was released by the Customs Officers. (TR. 1511 to 1521)

At the close of the Government's case, petitioner made a motion to strike from the evidence the testimony of the witness Johnson. This evidence was admitted over petitioner's timely objection.

The witness Hadzima testified, over timely objection by petitioner, that following the termination of his relations with Pursseley, Helm, Buono and Mary Asconi, that he, (Hadzima) Duke and petitioner Ballard were involved in a separate conspiracy from July, 1953, to December, 1954, during which time he smuggled some forty or fifty loads of birds into the United States. Hadzima testified that he and Ballard each took 45% of

the profits and gave Duke 10% in exchange for advice. (TR.842 - 860).

The witness Hadzima was allowed, over petitioner's timely objection, to give testimony affecting alleged conversations with petitioner Ballard, as to an alleged separate and distinct conspiracy, which conversations were alleged to have taken place during the month of February, 1953, and referred to acts and conducts entirely separated from, and having no connection with, the conspiracy charged in Count IV of the indictment. (TR. 714, et seq.)

At the close of the Government's case, petitioner made a motion to strike the testimony of Hadzima not having reference to the conspiracy charged in Count IV of the indictment. (TR. 1891)

All of these motions were denied and the trial court admonished the United States attorney to refrain from the use of the phrase "hijacking conspiracy." (TR. 1930)

REASONS FOR GRANTING WRIT

Certiorari should be granted in this case to resolve important questions of law as follows:

1. Concerning the first question raised herein, the reception in evidence, after objection, of separate and distinct conspiracies other than the one charged against petitioner, it is respectfully submitted:

That it was prejudicial error to admit the testimony of Thomas E. Johnson, Deputy Sheriff of San Diego County, over objection, and it was prejudicial error to admit the testimony of John W. Hadzima, over objection, on evidentiary matters, which on their face indicated they pertained to situations occurring long prior to the first overt act charged in the Fourth Count of the indictment, and long after the last overt act charged in the Fourth Count of the indictment.

That prejudice resulted to the petitioner from the reception of this evidence, which attached itself not at all to defendant Buono is readily apparent. The proof as to the conspiracy, the making of the plans for the robbery, and the details thereof, as shown by the evidence, took place in the office of defendant Buono, while he was present. Buono was acquitted as to Count IV, petitioner convicted as to Count IV.

Petitioner points out that from the inadmissible testimony of Hadzima, petitioner was very likely convicted of the conspiracy count, because of Hadzima's testimony as to the illegal smuggling of birds from July of 1953 until December of 1954.

Therefore, the most serious prejudicial error, petitioner believes, resulted from the admission of the testimony of Hadzima concerning the new conspiracy which Hadzima stated commenced in July of 1953, and continued until December of 1954, with only himself, Duke and petitioner members thereof. (TR. 842-860)

Prior to the time that the trial court made its final ruling denying petitioner a Bill of Particulars on June 24, 1955, at which time petitioner urged

information concerning the claim of the government subsequent to June of 1953, with reference to Count IV of the indictment, petitioner cited the case of Fishwick vs. United States, 329 U.S. 211, 67 S. Crt. 224, as holding that the date of the first overt act alleged, and the date of the last overt act alleged, marked the duration of the conspiracy. This was restated prior to the Government's opening statement. (TR. 48 to 52)

The dates of the overt acts set forth in Count IV of the indictment mark the scope of the conspiracy and its duration. That is to say, the date of the first overt act during April of 1953 marks the beginning of the conspiracy. The date of the last overt act during June of 1953 marks the termination of the conspiracy.

Fishwick vs. United States, 329 U.S. 211,
67 S. Crt. 224

Grunewald vs. United States, 353 U.S. 391,
77 S. Crt. 963

2. Concerning the second question, it was prejudicial error to deny petitioner's motion for severance and separate trial when the record then showed certainty of prejudice to petitioner, and the subsequent proceedings demonstrated that prejudice.

Opper vs. United States, (1954) 348 U.S. at 94, to the effect that there is an abuse of discretion denying such motion when prejudice appears.

When the court denied petitioner's motion on June 23, 1955, and before petitioner ever made his motion, and on June 3, 1955, defendant Duke stated in open court:

"I will be able to show that certain individuals, labor leaders and their attorneys, in league with Customs officers have entered into a conspiracy to, if I may say, if it please the Court, to obstruct justice themselves by procuring false evidence and having such evidence presented to the United States grand jury."

"I have clear proof, clear, unequivocal, undenied evidence that there has been a conspiracy entered into by officers of the court, attorneys in this community representing labor organizations, and United States Attorneys, not only to procure false evidence to have me indicted, but also to commit murder."

"Before I went before the Grand Jury to testify myself, my life was threatened by these people, and I think due to the interests of ----" (TR. 26A to 30A)

At this point everyone knew that the Duke trial would be a dog fight, and that anyone tried with defendant Duke would be prejudiced thereby.

The trial court contributed to the prejudice against petitioner, when he propounded this question:

(The Court): -----"Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?" (TR. 3213)

Petitioner Ballard was not required to state a position re Duke. (Constitution, Fifth Amendment)

The court's question was improper.

The United States Court of Appeals for the Ninth Circuit clearly demonstrated the prejudice to petitioner in the denial of his motion for severance and separate trial when in its opinion of August 13, 1957, (Appendix A) it used the following language:

> "Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, WITH THE OTHER DEFENDANTS and government witnesses and the public officials AS THE VICTIMS. (Emphasis added)."

The motion for severance and separate trial should have been granted.

United States vs. Perlstien, 120 F. 2d 276

Castellani vs. United States, 64 F. 2d 636

Kotteakos vs. United States, 90 L. Ed. 1557, 328 U.S. 750, 66 S. Ct. 1239

3. Concerning the third question, it was prejudicial error to cause petitioner to be subjected to mass trial.

To require petitioner to stand trial in the face of all allegations in all counts of the indictment, when actually the only incident in which petitioner was concerned in the charge against him was the planning to rob and the actual robbery in connection with the Desert Center "highjacking" conspiracy, resulted in gross prejudice to petitioner.

The very least the trial court should have done to insure petitioner a fair trial would have been to strike from the evidence, on the motion of petitioner, as it might affect petitioner, the evidence introduced by the Government in support of the charges contained in the seven counts of the indictment in which petitioner was not a defendant. Certainly the evidence of Spicuzza, Hadzima, Helm and Todd concerning their long range career in smuggling activities, and as it pertained to counts in the indictment in which petitioner was not named, had no application to the case against petitioner, and further shows the prejudice resulting to petitioner from the failure of the court to grant a severance and separate trial to petitioner; this evidence coupled with the evidence of the two separate and distinct conspiracies herein complained of had but one result.

The result was to subject petitioner to the type of mass trial such as was denounced in Kotteakos vs. United States, 90 L. Ed. 1557, 328 U.S. 750, 66 S. Ct. 1239; and Canella vs. United States, 157 Fed. 2d 470.

The situation in this case would seem to be one contemplated by Rule 19, governing review on certiorari, Subdivision B thereof:

> "has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision."

4. Concerning the fourth question raised, petitioner urges that the evidence will not support a conviction under the laws of the United States when the evidence shows that at all times when any plans were made for the alleged robbery, petitioner was in the United States of America, and at all times when the actual robbery took place, petitioner was in the United States of America, and that petitioner never had in his custody or under his control any contraband.

The United States Attorney, in his opening statement, referred to the Desert Center incident as the "hijacking" conspiracy and in his opening statement referred to Spicuzza being hijacked of that particular load of birds. (TR. 74)

Following the conclusion of the Government's case and during a discussion on various motions, the trial

court suggested to the United States Attorney that he refer to the Desert Center incident by some other term than the "hijacking" conspiracy, because it might tend to suggest to the jury that he was trying the defendants for hijacking from one another or one person committing a theft from another. (TR. 1930)

Should a smuggler bringing diamonds into the United States illegally, for example, be robbed of his diamonds, would the robber be guilty of a violation of the laws of the United States pertaining to importation of merchandise?

If an individual commits the crime of robbery entirely within the territorial limits of the State of California, does the Federal Government have any jurisdiction to prosecute him for that crime? In this particular case, if the smuggler Spicuzza had declared the birds and invoiced them at the proper Customs Office would the Federal Government have jurisdiction to prosecute petitioner for a conspiracy with others to rob Spicuzza of those birds, and of the actual robbery of Spicuzza of those birds within the territorial limits of the State of California?

The answer to both questions is an obvious no.

The fact that the victim of the robbery is a self professed and self confessed smuggler does not give the Federal Court jurisdiction to prosecute the robber for what is actually a violation of the laws of the State of California.

5. Concerning the fifth question, petitioner urges that the dignity of the United States Government will not

permit the conviction of any person on tainted testimony. Mesarosh vs. United States, 352 U.S. 1, 77 S. Ct. P.1.

The United States Court of Appeals in its opinion of August 13, 1957, adopted petitioners characterization of the witnesses. The court refers to them as co-laborers in the vineyard.

The Court of Appeals makes no comment about Mesarosh vs. United States, although cited and referred to in petitioner's closing brief.

It is submitted that this Honorable Court should take judicial notice of the fact that the character of a bird smuggler, one who wilfully, intentionally and purposely defrauds the Government and takes from the Government that which enables the Government to exist and survive is committing an act somewhat akin to treason. The smuggler will lie, cheat and steal.

Certainly a bird smuggler who is in prison, or under sentence or on probation, or faced with prosecution, can be expected to lie to further his own interests, --- or what he believes are his interests.

In petitioner's petition for rehearing, addressed to the United States Court of Appeals for the Ninth Circuit, following its opinion of August 13, 1957, petitioner made the following statement:

> "With the Mesarosh case in mind Ballard respectfully suggests in the interest of justice that this Honorable Court obtain fromthe U. S. Attorney a written report concerning the above-named Hadzima, Spicuzza, Todd, Helm, and

"Asconi and Curtis. Such a report Appellant believes and respectfully urges will show that since the trial in this case Hadzima has received a reduction of a prison sentence and forgiveness of a fine; that Spicuzza and Todd have received early paroles; that as to Helm a charge in violation of customs re whiskey importation was dropped (this one different from the case referred to in the evidence in this case); that Curtis was never prosecuted; and that a charge against Asconi of smuggling psittacine birds (different from any incident in this trial) was dropped or that she received probation.

Counsel for Ballard has neither the inclination nor the facilities for checking these items out, but has full confidence in the integrity of the U.S. Attorney to correctly present these matters to this Honorable Court in writing; and counsel for Ballard will accept such written report from the U.S. Attorney unquestioned and unchalleneged. In view of the testimony of these witnesses upon the trial of this case concerning lack of consideration to them for their testimony, an inquiry, in the light of the decision in Mesarosh, seems in order and if it appears the testimony of these witnesses was tainted testimony Ballard's conviction should not stand."

As far as petitioner can ascertain, this request was never acted upon by either the United States Court of Appeals or by the United States Attorney. In the light of the decision in the Mesarosh case, it is submitted that this situation is one falling within Subdivision B, Rule 19, of the Supreme Court concerning

considerations governing review on certiorari. Since the petition of Ballard for rehearing in the Court of Appeals was filed, petitioner has learned that Asconi had been convicted of smuggling and had received probation concerning an incident that took place about the time that she was a witness in the case against petitioner.

CONCLUSION

It is respectfully submitted that petitioner's conviction resulted from a denial of due process of law and that the errors of law presented herein warrant and require the granting of the Writ of Certiorari as prayed for.

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(Admitted to practice in the Supreme
Court of the United States
November 12, 1957)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD and Vic Buono,	)	
Appellants,	)	No. 15,146
vs.	)	Aug. 13, 1957
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Upon Appeal from the United States District Court
For the Southern District of California
Southern Division

Before: STEPHENS, LEMMON and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This is a criminal case in which there was laid bare a tremendous traffic in the smuggling of psittacine birds into the United States from the Republic of Mexico. Irrespective of the merits, it is a sordid story of intrigue, double-dealing and feuds among the participants, with treacherous interludes and escapades.

Parrots, parakeets and, broadly speaking, any bird with a hooked beak are denominated psittacine birds. There is a quarantine against the importation of such fowl into the United States.[1] However, there appears to be a vast importation of these birds here. It is not the custom in this commerce to pay any duties on psittacines. Indeed, it would appear from the record that there is no known instance of such an impost having been paid.

In general, the participants in this traffic were as malodorous as the commerce therein itself. The testimony was furnished by co-defendants in the vineyard, who were characterized by one of the defendants as:

> "John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled."

The indictment was in ten counts. Three separate conspiracies were charged (in Counts I, IV and VII). Five counts charged smuggling (II, V, VIII, IX and X). Two counts charged certain defendants with knowingly receiving, concealing and facilitating the transportation and concealment of certain birds after illegal transportation (III and VI).

---

[1]See 42 C.F.R. § 71.152(b), promulgated under authority of 42 U.S.C.A. § 264.

Appellants Duke, Ballard and Buono, having been convicted on certain counts by a jury, appeal.

All of these appellants raise the point that the convictions under 18 U.S.C.A. § 545,[2] the general smuggling statute for felony, cannot stand because the Surgeon General, under authority of 42 U.S.C.A. § 264, passed a health and safety regulation forbidding, with

---

[2]"Smuggling goods into the United States
"Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law ---
"Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.
"Merchandise introduced into the United States in violation of this section shall be forfeited to the United States." 18 U.S.C.A. § 545.

minor exceptions, importation of psittacine birds. See 42 C.F.R. § 71.152(b). This regulation carries a penalty for a misdemeanor. 42 U.S.C.A. § 271(a). The same argument is applied to 18 U.S.C.A. §§ 42 and 43. But these contentions have no validity. Appellants may have committed two crimes, one a misdemeanor and the other a felony. See Steiner vs. United States, 9 Cir., 229 F. 2d 745, cert. den., 351 U.S. 953. If there is any conflict between the statute and the regulation, the former prevails. See Murray vs. United States, 9 Cir., 217 F.2d 503; Callahan vs. United States, 285 U.S. 515. The case of Berra vs. United States, 351 U.S. 131, has no pertinency upon this point. Where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. United States vs. Beacon Brass Co., 344 U.S. 43; United States vs. Noveck, 273 U.S. 202.

It is argued that psittacine birds are not merchandise which should have been invoiced under the customs laws. But this has no validity. Steiner vs. United States, supra. In that connection, it is urged that the substantive counts are defective because they were insufficient to charge that appellants violated 18 U.S.C.A. § 545, by failing to comply with 19 U.S.C.A. §§ 1461 and 1484. This latter point has no apparent connection with any count except those relating to receiving and facilitating. See Babb vs. United States, 5 Cir., 218 F.2d 538. As to the latter counts, the indictment there contained the statement that the importation was contrary to 19 U.S.C.A. ch. 4, and particularly to §§ 1461 and 1481 thereof.

Duke, who is a lawyer, complains of his representation before the court. Under the circumstances,

the complaint is of very little moment. He seems to have hoped, by complicating the situation, he could gain some advantage at the trial. Since that failed, he now attempts to use the situation he created as error to obtain reversal upon appeal. There is nothing more revolting in the American courts than the attempt of lawyers, as criminals, to use the guaranties set up for fair trial as technicalities to shield them from just conviction. The record in this case shows clearly that Duke is guilty. He has been convicted by a jury.

Duke attempted to impose a dilemma upon the trial court by proposing to represent himself and to associate a Mr. Fitzgerald, a lawyer, apparently as a junior. The court saw the difficulties and suggested that Duke appear in propria persona under limitations that he could not argue as to his own testimony to the jury or that he should turn the defense over to Fitzgerald. This was modified to permit Duke to examine and cross-examine witnesses. But Duke claimed the right to make the opening statement, and proclaimed that no one else was competent to make this presentation. The trial court ruled otherwise. Duke moved to have Mr. Fitzgerald released from the case, so that Duke could make the opening statement and conduct all further proceedings. The court denied this motion. Mr. Whelan, attorney for appellant Ballard, made the opening statement for Duke. The trial court explained that Duke had been under indictment for months and had made no appropriate attempts to settle the question of representation until the time of trial.

Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or

conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, with the other defendants and government witnesses and the public officials as the victims. The trial court was perfectly correct in maintaining firm control of his courtroom and of the proceedings therein. In this aspect of the cause at the outset of the trial, the trial court was not bound to allow Duke to use his position as defendant as a launching ground for missiles, even if as a lawyer he believed his best defense was the familiar one of trying the prosecutors and witnesses for the prosecution.

This situation was thereafter further complicated when the supposed "special defense" of conspiracy of the officials and others fell flat. Mr. Fitzgerald repudiated it. Now Duke assigns as error the trial of the issue by attempting to place the blame upon Mr. Fitzgerald, who, he said, misunderstood the defense on account of lack of preparation and unfamiliarity with the case. Duke also assigns as error that the trial court permitted extraneous issues to seep into the case to his prejudice. The record has been carefully reviewed. This Court finds Duke, and Duke alone,

responsible for the introduction and trial of these charges, and that he attempted to shift the burden thereof only when it was obvious the introduction was deleterious and not helpful to his cause.

There are other matters of no merit raised by Duke. (1) He complains that the witness Sankary was put on the stand by the government and asked only whether he had been subpoenaed by the defense. The defense did not call the witness. (2) Duke was asked an impeaching question on cross-examination. It was not followed up by testimony supporting the statement which he purportedly made. Sankary was one of the persons purported to have heard the statement by Duke. No objection was made at any time during the trial to either of these matters. There was no error.

Duke assigns as error certain argument by the prosecution calling attention to the absence of evidence to support the "special defense" of conspiracy by government officials and others. There was no objection at the time. When Duke referred to the matter at a subsequent time, the court ruled Duke had invited the comment. This was correct.

Exception was taken generally to the fact that the court commented upon the charge that certain government witnesses had in effect conspired together to tell false stories. The general effect of the comment was that the situation of the witnesses should be considered, especially as to what access and lack of access they had. It was said persons in the penitentiary are under some restraint and some degree of unavailability to others, but there are extents of availability. The jury were told to analyze the testimony and to determine whether

they could believe all or any part of it. Some of the witnesses had been in the penitentiary.

It is obvious that the court was directing, as it had a right to do, the jury to analyze the testimony and calling attention to some special circumstances in relation to the situation of these witnesses. The judge likewise admonished the jury that they were the judges of the facts and the credibility of the witnesses and they had the right to disregard entirely any comment of his.

The power of a trial judge in the federal court to comment fairly to the jury, if he leave to them the final decision and the power to disregard his remarks, has never been denied. The only question ever raised is whether he has abused his authority. The trial court here commented fairly and regarded the appropriate restrictions.

The court admitted the record of a telephone conversation held during the progress of the trial between Duke and Buono, both defendants on one side, and government witness Hadzima on the other. The recording was made by Duke. The trial record is confused, but Duke is apparently now claiming that he was prevented from cross-examining Hadzima as to the conversation. He also claims the conversation tended to prove a conspiracy against him. The ruling of the court gave him everything to which he was entitled, since the jury had the whole record and were entitled to judge thereby of the credibility of this witness. The conversation did not tend to establish a conspiracy to convict Duke.

There was no error in the refusal of the court to permit a witness to testify that during a certain period Duke was heavily in debt and had to borrow from the bank to meet current operating expenses. The purpose was to rebut testimony of Hadzima that he had paid Duke during this same period fabulous sums of money.

Likewise the court refused to allow Duke to show that Helm, a government witness, had, immediately prior to trial, engaged in collateral illegal conduct for which he had not been prosecuted. This was not error.

The trial court permitted Hadzima, a government witness, to have advice of private counsel while testifying. It must be said this is an extremely dangerous practice. There is some authority that it is within the discretion of the trial court. But, if a witness must have such advice during his testimony, the government had better not call him. The witness, upon advice of counsel, claimed the protection of the Fifth Amendment on certain questions, upon one of which the court ruled he was so entitled. Upon another question, the court ruled that certain phases were within the scope of his previous testimony, and required the witness to answer, but limited the question in other respects. Upon advice of his attorney, Hadzima corrected a former statement and revealed that he had been told that the prosecution of a different case would be dropped if Hadzima testified for the government in the instant case. This admission supported the theory of Duke and redounded to his benefit. He thus elicited, upon cross-examination, an interest or motive which might indicate bias after the witness had flatly denied such a fact on direct.

We entirely disapprove of the practice of any

witness in a criminal case, especially a government witness, receiving secret advice from anyone while he is on the stand. It is a destructive precedent. But, in the present case, it obviously did not harm Duke; but helped him. The error was not prejudicial.

The trial court refused to give a requested instruction of defendant to the effect that, if it were within the power of the government to produce stronger and more satisfactory evidence, and they failed to do so, the inference is that such evidence would be unfavorable to the government. The request was improper. A correct instruction would apply to either party, even in a criminal case. The balance of the requested instruction, that the burden of proof was on the government, was adequately covered and completely clear from the instruction given by the court.

The court gave an instruction at length to the effect that the uncorroborated testimony of an accomplice or co-conspirator is to be scrutinized and accepted with caution. Duke contends that the court should have instructed that "a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." This latter is not the rule in the federal courts. There was no error in the instructions given.

Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial.

The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown.

Buono raises the point that the counts of the indictment, I, IV and VII, charge three separate conspiracies. Several persons, including some defendants, were accused of membership in each of these conspiracies, which each related to the traffic in psittacine birds. Buono was charged by counts IV and VII, respectively, of membership in two of such conspiracies. He was acquitted on count IV, but convicted on count VII. He claims he was a victim of a mass trial. He further contends that there was only one conspiracy and that it is error to break the charge into three.

Kotteakos vs. United States, 328 U.S. 750, is an example of the mass trial of several conspiracies under

an indictment charging only one. As such, the convictions were set aside. But it needs no argument to prove that the reverse of this situation is unfair. If there were a conspiracy which continued over a long period of time and different persons were involved in different phases, it would not be improper to charge those in one phase with one conspiracy and use a separate count to charge all those in a different phase as co-conspirators in such different phase.

Instead of militating against the conclusion that this procedure was fair as to Buono, his acquittal on one conspiracy count and his conviction on another support it. For, if the indictment had been in only one count for one conspiracy, Buono would have been convicted of participation in the whole integrated conspiracy. That conviction would illustrate the danger of a mass trial. But here the jury discriminated. He was found guilty of that phase in which the jury found he participated and acquitted of conspiracy on other phases. Even though Buono could demonstrate that, considered from the standpoint of pure logic, splitting into several counts an integrated conspiracy was technically incorrect, he did not suffer injustice thereby.

The record as a whole demonstrates beyond possibility of doubt the guilt of each defendant of the crimes of which the jury convicted him. Furthermore, there is demonstrated a widespread, persistent and defiant combination to treat the criminal law as if it did not exist. Repeated convictions did not deter these felons. Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes. The record demonstrates that easy release on bail of hardened malefactors after conviction

breeds contempt of law and sardonic patronage of judges.

The trial as a whole was fair and impartial. Each defendant was demonstrably guilty. No record in any criminal case is so perfect that an astute lawyer cannot suggest possibility of error. Any error in this record was not prejudicial to any defendant. As has been shown, there was none of consequence.

Affirmed.

(Endorsed:) Opinion. Filed Aug. 13, 1957
Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD and VIC BUONO,	)	
Appellants,	)	No. 15,146
	)	Jan. 7, 1958
vs.	)	
UNITED STATES OF AMERICA	)	
Appellee.	)	

Upon Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: STEPHENS, Chief Judge, LEMMON and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This is a criminal case in which there was laid bare a tremendous traffic in the smuggling of psittacine birds into the United States from the Republic of Mexico. Irrespective of the merits, it is a sordid story of intrigue, double-dealing and feuds among the participants, with treacherous interludes and escapades.

Parrots, parakeets and, broadly speaking, any bird with a hooked beak are denominated psittacine birds. There is a quarantine against the importation of such fowl into the United States.[1] However, there appears to be a vast importation of these birds here. It is not the custom in this commerce to pay any duties on psittacines. Indeed, it would appear from the record that there is no known instance of such an impost having been paid.

In general, the participants in this traffic were as malodorous as the commerce therein itself. The testimony was furnished by co-laborers in the vineyard, who were characterized by one of the defendants as:

> "John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled."

The indictment was in ten counts. Three separate conspiracies were charged (in Counts I, IV and VII). Five counts charged smuggling (II, V, VIII, IX and X). Two counts charged certain defendants with knowingly receiving, concealing and facilitating the transportation and concealment of certain birds after illegal importation (III and VI).

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[1]See 42 C.F.R. § 71.152(b), promulgated under authority of 42 U.S.C.A. § 264.

Appellants Duke, Ballard and Buono, having been convicted on certain counts by a jury, appeal.

All of these appellants raise the point that the convictions under 18 U.S.C.A. § 545,[2] the general smuggling statute for felony, cannot stand because the Surgeon General, under authority of 42 U.S.C.A. § 264, passed a health and safety regulation forbidding, with

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[2] "Smuggling goods into the United States
"Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -- "Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.
"Merchandise introduced into the United States in violation of this section shall be forfeited to the United States." 18 U.S.C.A. § 545.

minor exceptions, importation of psittacine birds. See 42 C.F.R. § 71.152(b). This regulation carries a penalty for a misdemeanor. 42 U.S.C.A. 271 (a). The same argument is applied to 18 U.S.C.A. §§ 42 and 43. But these contentions have no validity. Appellants may have committed two crimes, one a misdemeanor and the other a felony. See Steiner vs. United States, 9 Cir., 229 F.2d 745, cert. den., 351 U.S. 953. If there is any conflict between the statute and the regulation, the former prevails. See Murray vs. United States, 9 Cir., 217 F.2d 503; Callahan vs. United States, 285 U.S. 515. The case of Berra vs. United States, 351 U.S. 131, has no pertinency upon this point. Where different proof is required for each offense, a single act or transaction may violate more than criminal statute. United States vs. Beacon Brass Co., 344 U.S. 43; United States vs. Noveck, 273 U.S. 202.

It is argued that psittacine birds are not merchandise which should have been invoiced under the custom laws. But this has no validity. Steiner vs. United States, supra. In that connection, it is urged that the substantive counts are defective because they were insufficient to charge that appellants violated 18 U.S.C.A. § 545, by failing to comply with 19 U.S.C.A. §§ 1461 and 1484. This latter point has no apparent connection with any count except those relating to receiving and facilitating. See Babb vs. United States, 5 Cir., 218 F.2d 538. As to the latter counts, the indictment there contained the statement that the importation was contrary to 19 U.S.C.A. ch. 4, and particularly to §§ 1461 and 1481 thereof.

Duke, who is a lawyer, complains of his representation before the court. Under the circumstances,

the complaint is of very little moment. He seems to have hoped, by complicating the situation, he could gain some advantage at the trial. Since that failed, he now attempts to use the situation he created as error to obtain reversal upon appeal. There is nothing more revolting in the American courts than the attempt of lawyers, as criminals, to use the guaranties set up for fair trial as technicalities to shield them from just conviction. The record in this case shows clearly that Duke is guilty. He has been convicted by a jury. Nevertheless, if the constitutional rights of Duke were violated, this Court must give him redress.

There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestioned right to defend himself.[3] Second, an accused should never have counsel not of his choice forced upon him.[4] This Court has never failed to recognize either of these fundamental rights.

As we review the record as to representation by counsel or in propria persona, it is clear that the

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[3] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel ****." 28 U.S.C.A. § 1654.

[4] "The Constitution does not force a lawyer upon a defendant." Adams vs. United States, 317 U.S. 269, 279.

confusion was caused by Duke and Duke alone. He acquiesced and consented to limitations on his right to represent himself. He attempted to repudiate the limitations subsequently, but that circumstance cannot vitiate his previous waiver. If defendant were an ignorant and untutored person, there might be some force to his present claim. But Duke is a trial lawyer of long experience.

Duke, at the hearing for arraignment and plea before a judge other than the one who tried the case, asked permission to proceed in propria persona for preliminary motions pertaining to the attack on the indictment. He represented to the judge at the time that counsel would appear for him at trial. Permission was granted.

Afterward, in apparent pursuance of this suggestion, Duke presented a Mr. Fitzgerald, a competent attorney, to the judge who eventually tried the case. However, at an informal colloquy in chambers, Duke indicated he wished Mr. Fitzgerald as an associate. The trial judge agreed that another lawyer should be in the case and suggested that Duke should not testify and also attempt to argue the case to the jury. Whatever may be thought of the legal basis of this idea, Duke fully agreed with the underlying practice and consistently held to that position throughout the trial.[5] The thesis of

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[5]"At one point he said: "I didn't ... -- please of the court, I had never intended to argue the case. I realize the rule, that having testified myself, I wouldn't be permitted to argue nor would it be wise for me to argue my own testimony or any of the testimony. And I realize my own emotional feelings in the case."

the trial court was apparently that Duke, if acting as client and lawyer, would be involved emotionally and prejudice his own case.[6] After a great deal of discussion, in which Duke, Fitzgerald and the trial judge participated, all were in agreement.

In open court, before the jury had been empaneled, Duke moved for the entry of Mr. Fitzgerald as co-counsel, and thus sought to impose a dilemma upon the trial judge. But the judge made his position clear that Duke could appear in proper person subject to limitations to which Duke had agreed or he could appear through counsel. As a result, Mr. Fitzgerald, who was of Duke's own choosing, entered the case as counsel for Duke. At the insistence of Duke, however, the latter was allowed, by the discretion of the court, certain personal participation such as examination of witnesses and making and arguing motions to the court. Parenthetically, the trial court was extremely fair in permitting Duke all the privileges agreed upon. Nothing was

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[6] The judge expressed himself as follows:
"The Court: Now, he being necessarily involved as a man would, emotionally in the problem, it is just not a good thing for him to be participating as an attorney in the courtroom. You know, Mr. Fitzgerald, how many times a lawyer will say or do things which will militate very strongly against him when he acts under the stress of emotion.
"Mr. Fitzgerald: Yes.
"The Court: How much more he is apt to do that if he is both client and lawyer? I don't think it is practical."

said about an opening address to the jury by Duke. Both Mr. Fitzgerald and Duke apparently agreed that the participation of Duke would be so limited, for the trial judge had made it abundantly clear that Mr. Fitzgerald was to have full control of the cause. When he accepted Fitzgerald as counsel subject to his personal participation only as permitted by the court, Duke made an election of record in open court.

After the jury was empaneled and before taking of testimony, the court again sought to clarify the status of Duke, so that there would be no confusion about his participation. It was pointed out that the obligation of Duke was to appear in propria persona or be represented by counsel, but that he did not have a right to a hybrid of the two.[7] However, the court reiterated its decision to permit Duke limited participation with his counsel. The court reserved all arguments of fact and the opening statement to the jury on behalf of Duke to Mr. Fitzgerald.

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[7]This is a correct statement of the law. See Shelton vs. United States, 5 Cir., 205 F.2d 806, 812-813. "The cases cited * * * stress * * * the right of an accused to act for himself and his right to have a lawyer assigned in his behalf. * * * Obviously, however, those rights cannot be both exercised at the same time." United States vs. Mitchell, 2 Cir., 137 F.2d 1006, 1010.

At this point, Duke for the first time insisted upon the right to make an opening statement, but the court ruled that Mr. Fitzgerald was to make this presentation. Duke claimed Mr. Fitzgerald was unprepared. The court then called attention to the fact that Duke had been under indictment for months and had made no appropriate attempts to settle the question of representation until the time of trial.

The trial judge offered to recess the case until Mr. Fitzgerald could prepare himself with the assistance of Duke to make the opening statement. The court said:

> "I know academically you are educated, Mr. Fitzgerald, but as to the facts, if you are not well prepared, you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants."

Duke refused this offer.

Duke then moved to have Mr. Fitzgerald released from the case. The court denied this motion.[8] Mr. Whelan, attorney for Ballard, made the opening statement for Duke, with the consent of the latter.

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[8]It should be noted that all these proceedings were out of the presence of the jury.

Duke was not denied the right to represent himself. Counsel was not forced upon him. Mr. Fitzgerald was counsel of Duke's own choosing. Duke consented to have Mr. Fitzgerald represent him, with limitations upon his own presentation. The court was not in error in refusing to permit Duke to repudiate his agreement to the arrangement. Any right Duke had was waived by his conduct and his informed consent.

Although there are expressions which, taken out of context, might indicate that Duke wished to try the case in propria persona, he never at any time unqualifiedly took that position. His duty was to have refused to proceed otherwise if he wished to raise the point here.

Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. If it can be believed that these statements and innuendos were not made in the first instance by Duke himself, at any rate these were specifically adopted[9] by him while on trial. Among those

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[9]"The Court: ***'*** But the reason those witnesses came forth and told what, to our defense contention is a trumped up story against us, is that a certain group of persons, Sankary, Hannah, Vader, Steward, some labor unions operating in this county, the Customs Service, the United States Attorney's office' -- I don't know if I have enumerated them all -- 'have combined together' -- and I think Judge Solomon -- 'to induce

supposed to be assisting in the combination to frame him were included a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court may well have taken the whole situation into consideration in his rulings upon the question of representation. There have been examples of split representation whereby a lawyer defendant was enabled to use associate counsel as a shield while he engaged in offensive tactics himself. We see no reason why the trial court should

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these witnesses, who have testified for the government, to tell a false story or series of false stories in order to wreck the private vengeance of Vader, Sankary, Steward, and so on, against these particular defendants.'

"Now, I don't think it is claimed that Judge Solomon was personally out to get these particular defendants, but Judge Solomon is said to be going along with the plan and scheme, and the labor unions, Mr. Sankary, Mr. Steward, Mr. Vader, who are out to establish a trumped up false case against these defendant. * * *

"Now, is that right, Mr. Duke?"

"Mr. Duke: That is our defense, your Honor. That is my defense. However, I think your Honor has included persons in your enumeration of people, that were a part of the scheme, that I do not contend that were a part of it." (Emphasis supplied).

It is unnecessary to prolong the excerpt to show that Duke claims to have modified the position as to certain of the persons named and suggested that the Federal Bureau of Investigation was misled and the United States Attorney was unwittingly a party.

have been compelled to allow Duke to turn this proceeding into a Roman holiday, with the other defendants and government witnesses and the public officials as the victims. The trial court was perfectly correct in maintaining firm control of his courtroom and of the proceedings therein. In this aspect of the cause at the outset of the trial, the trial court was not bound to allow Duke to use his position as defendant as a launching ground for missiles, even if as a lawyer he believed his best offense was the familiar one of trying the prosecutors and witnesses for the prosecution.

This situation was thereafter further complicated when the supposed "special defense" of the conspiracy of the officials and others fell flat.[10] Mr. Fitzgerald repudiated it. Now Duke assigns as error the trial of the issue by attempting to place the blame upon Mr. Fitzgerald, who, he said, misunderstood the defense on account of lack of preparation and unfamiliarity with the case. Duke also assigns as error that the trial court permitted extraneous issues to seep into the case to his prejudice. The record has been carefully reviewed. This Court finds Duke, and Duke alone, responsible for the introduction and trial of these charges and that he attempted to shift the burden thereof only when it was obvious the introduction was deleterious and not helpful to his cause.

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[10]The caution of the trial judge in the first colloquy, that, if Duke personally participated to a great extent, he might prejudice his case, seems to have been fulfilled.

There are other matters of no merit raised by Duke. (1) He complains that the witness, Sankary, was put on the stand by the government and asked only whether he had been subpoenaed by the defense. The defense did not call the witness. (2) Duke was asked an impeaching question upon cross-examination. It was not followed up by testimony supporting the statement which he purportedly made. Sankary was one of the persons purported to have heard the statement by Duke. No objection was made at any time during the trial to either of these matters. There was no error.

Duke assigns as error certain argument by the prosecution calling attention to the absence of evidence to support the "special defense" of conspiracy by government officials and others. There was no objection at the time. When Duke referred to the matter at a subsequent time, the court ruled Duke had invited the comment. This was correct.

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calling attention to some special circumstances in relation to the situation of these witnesses. The judge likewise admonished the jury that they were the judges of the facts and the credibility of the witnesses and they had the right to disregard entirely any comment of his.

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The trial court permitted Hadzima, a government witness, to have advice of private counsel while testifying. It must be said this is an extremely dangerous practice. There is some authority that it is within the discretion of the trial court. But, if a witness must have such advice during his testimony, the government had better not call him. The witness, upon advice of counsel, claimed the protection of the Fifth Amendment on certain questions, upon one of which the court ruled that he was so entitled. Upon another question, the court ruled that certain phases were within the scope of his previous testimony, and required the witness to answer, but limited the question in other respects. Upon advice of his attorney, Hadzima corrected a former statement and revealed that he had been told that the prosecution of a different case would be dropped if Hadzima testified for the government in the instant case. This admission supported the theory of Duke and redounded to his benefit. He thus elicited, upon cross-examination, an interest or motive which might indicate bias after the witness had flatly denied such a fact on direct.

We entirely disapprove of the practice of any witness in a criminal case, especially a government witness, receiving secret advice from anyone while he is on the stand. It is a destructive precedent. But, in the present case, it obviously did not harm Duke, but helped him. The error was not prejudicial.

The trial court refused to give a requested instruction of defendant to the effect that, if it were within the power of the government to produce stronger and more satisfactory evidence, and they failed to do so, the inference is that such evidence would be unfavorable to the government. The request was improper. A correct instruction would apply to either party, even in a criminal case. The balance of the requested instruction, that the burden of proof was upon the government, was adequately covered and completely clear from the instruction given by the court.

The court gave an instruction at length to the effect that the uncorroborated testimony of an accomplice or a co-conspirator is to be scrutinized and accepted with caution. Duke contends that the court should have instructed that "a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." This latter is not the rule in the federal courts. There was no error in the instructions given.

Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by only three of the

ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown.

Buono raises the point that the counts of the indictment, I, IV and VII, charge three separate conspiracies. Several persons, including some defendants, were accused of membership in each of these conspiracies, which each related to the traffic in psittacine birds. Buono was charged by counts IV and VII, respectively, of membership in two of such conspiracies. He was acquitted on count IV, but convicted on count VII. He claims he was a victim of a mass trial. He further contends that there was only one conspiracy and that it is error to break the charge into three.

Kotteakos vs. United States, 328 U.S. 750, is an example of the mass trial of several conspiracies under an indictment charging only one. As such, the convictions were set aside. But it needs no argument to prove that the reverse of this situation is unfair. If there were a conspiracy which continued over a long period of time and different persons were involved in different phases, it would not be improper to charge

those in one phase with one conspiracy and use a separate count to charge all those in a different phase as co-conspirators in such different phase.

Instead of militating against the conclusion that this procedure was fair as to Buono, his acquittal on one conspiracy count and his conviction on another support it. For, if the indictment had been in only one count for one conspiracy, Buono would have been convicted of participation in the whole integrated conspiracy. That conviction would illustrate the danger of a mass trial. But here the jury discriminated. He was found guilty of that phase in which the jury found he participated and acquitted of conspiracy on other phases. Even though Buono could demonstrate that, considered from the standpoint of pure logic, splitting into several counts an integrated conspiracy was technically incorrect, he did not suffer injustice thereby.

The record as a whole demonstrates beyond possibility of doubt the guilt of each defendant of the crimes of which the jury convicted him. Furthermore, there is demonstrated a widespread, persistent and defiant combination to treat the criminal law as if it did not exist. Repeated convictions did not deter these felons. Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes. The record demonstrates that easy release on bail of hardened malefactors after conviction breeds contempt of law and sardonic patronage of judges.

The trial as a whole was fair and impartial. Each defendant was demonstrably guilty. No record in any criminal case is so perfect that an astute lawyer cannot suggest the possibility of error. Any error in this

record was not prejudicial to any defendant. As has been shown, there was none of consequence.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 7, 1958.

Paul P. O'Brien, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,146

CLIFFORD L. DUKE, JR.,)
LOUIS GLENN BALLARD)
and VIC BUONO,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is

affirmed.

(Endorsed:) Judgment Filed and Entered: January 7, 1958.

Paul P. O'Brien, Clerk.

SUPREME COURT, U. S.

FILED

APR 15 1958

JOHN T. FEY, Clerk

Nos. 612 and 616 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOUIS GLENN BALLARD, PETITIONER

v.

UNITED STATES OF AMERICA

VIC BUONO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

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OPINION BELOW

The opinion (C. A. 3–15) [1] of the Court of Appeals has not yet been reported.

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[1] The Court of Appeals proceedings appear in a volume entitled Volume 37 of the transcript of record, but this volume is not paginated in accordance with the other volumes. Therefore, the Court of Appeals proceedings are referred to herein as "C. A.". The rest of the transcript is referred to as "R.".

Pagination within the volumes also requires explanation. Volume 1 of the transcript begins with the day on which the

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1958 (C. A. 17). A petition for rehearing was denied on January 22, 1958 (C. A. 16). On February 20, 1958, Mr. Chief Justice Warren extended the time within which petitioner Buono (No. 616 Misc.) might file a petition for a writ of certiorari to and including March 21, 1958, and his petition was filed on that date. On February 21, 1958, Mr. Chief Justice Warren extended the time within which petitioner Ballard (No. 612 Misc.) might file a petition for a writ of certiorari to and including March 21, 1958. His petition was filed on March 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment properly charged separate conspiracies.

2. Whether it was reversible error to have denied petitioner Ballard's motion for severance.

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jury was chosen (August 3, 1955) and includes pages 1–165, but does not contain a transcript of the jury empanelment. A separate unnumbered volume entitled "Jury Impanelment" contains these proceedings in the following pages: 36, 36–A–1 to 36–A–171. A second unnumbered volume entitled "On Appeal" contains a verbatim transcript of the proceedings had prior to trial in June and July, 1955, such as the arraignment and the hearings on motions; those numbers run from 1–A to 146–A, inclusive. Also on file with this Court is a volume also entitled "Volume I" which is to be distinguished from Volume I of the transcript which contains the indictment, appearances, motions, requested instructions, etc., and a summary of the transcript. Each document therein is numbered separately and the summary of proceedings is identified by date alone. This volume is referred to as "Summ.".

3. Whether it was reversible error to admit testimony of co-conspirator Hadzima and police officer Johnson.

4. Whether petitioner Ballard was properly charged with the commission of federal offenses.

5. Whether it was proper to allow the jury to consider accomplice testimony.

6. Whether petitioner Buono was afforded full opportunity to challenge the credibility of co-conspirator Helm.

STATEMENT

On May 25, 1955, a 10-count indictment was filed in the United States District Court for the Southern District of California charging the smuggling of and conspiracy to smuggle psittacine birds (parrots, parakeets, etc.) into the United States from Mexico (Summ., Indict., pp. 1–15). Count 1 charged that defendant Duke along with thirteen other conspirators, not defendants, conspired to smuggle psittacine birds into this country from Mexico from January to April, 1953 (Summ., Indict., pp. 1–3). Count 4 charged that petitioners Ballard and Buono conspired with Duke, and five others, not named as defendants, to smuggle psittacine birds from April 1953 to December 1954 (Summ., Indict., pp. 6–8). Count 7 charged that defendants Buono and Duke conspired with four others to smuggle birds during the period June through October, 1953 (Summ., Indict., pp. 11–12). The other counts charged substantive offenses of smuggling or receipt, concealment and transportation of smuggled birds.

Petitioner Ballard was convicted of the conspiracy charged in count 4 and the substantive offenses charged in counts 5 and 6 (R. 5192). He was sentenced to a total of 9 years imprisonment: 5 years on count 4, 2 years on count 5 consecutive to the term under count 4, and 2 years on count 6, consecutive to the term imposed under count 5 (R. 5319). Petitioner Buono was convicted of the conspiracy charged in count 7, and substantive counts 8–10 (R. 5193–5194). He was sentenced to concurrent 2 years terms of imprisonment on each of said counts with execution suspended and probation for three years. He was fined $3,000 on count 8, $1,000 on count 9, and $1,000 on count 10. The payment of the fines was made a condition of probation (R. 5319–5320).[2] On appeal, the convictions were affirmed (C. A. 3–13).

The evidence adduced by the government may be summarized as follows:

1. John Hadzima, a poultry rancher near San Diego, California, who had been importing chickens from Mexico, commenced, in 1949, to smuggle parrots into the United States along with his legal shipments (R. 268, 698, 700). Although apprehended and convicted twice, in 1949 and 1950, Hadzima nonetheless expanded his illegal activities in 1950 or 1951 by taking Nicolas Spicuzza, a childhood friend, and

[2] Defendant Duke, the only one named in all counts, was convicted on all ten counts (R. 5189–5190), and sentenced to a total of 11 years' imprisonment (R. 5318–5319). In his petition for certiorari (No. 577 Misc.) filed on February 26, 1958, Duke challenged only the trial court's refusal to allow him to discharge his counsel. A separate Brief in Opposition has been filed in that case.

others into his operation as partners (R. 128–130, 701, 865–867). The group used Segovia, Hamm, and Vosburg to bring psittacine birds[3] across the Mexican border. In November, 1952, they organized the Los Angeles Pet Exchange to dispose of the birds after importation (R. 130–133, 333, 1479).

In 1952, Segovia, Hamm, and Vosburg were apprehended by customs agents while bringing a load of birds over the Mexican border (R. 131, 132). As of that time, the partners were acquainted with petitioner Buono, who had arranged a bond for Segovia (R. 133–134, 707). At this point also, the partners first met defendant Duke, retaining him to defend Vosburg (R. 133).

2. Shortly after Vosburg's acquittal on January 13, 1953 (R. 1021), Hadzima and his partners retained Duke to handle their affairs (R. 134, 706). At this meeting Duke asked the partners to consider the possibility of flying the birds across the border, saying that he could provide a pilot (R. 136–137, 706–707, 1482). This was Robert Helm whom Duke had defended on a charge of smuggling aliens (R. 706, 1032).[4]

After the conference which resulted in the retention of Duke as general counsel for the partnership, Hadzima returned to consult with Duke alone. Hadzima had been mulling over the fact that a good many of the birds which he had shipped from Europe

[3] Broadly speaking, any bird with a hooked peak, such as parrots, parakeets, macaws, and the like, are psittacine birds.

[4] This marked the inception of the conspiracy charged in count 1 which did not name these petitioners.

had disappeared in Mexico City, and he had come to the conclusion that Spicuzza was stealing birds from him. Hadzima therefore told Duke he intended to break off his relationship with Spicuzza (R. 709–710). When Duke suggested that there were other ways of adjusting accounts, Hadzima mentioned that he planned to "hijack" the next shipment of partnership birds. Hadzima had already arranged with one Pursselley and petitioner Ballard to have them steal the next load of birds, and later informed them of the time and place to obtain access to the load (R. 716–718, 722–723). Duke was to share in the proceeds (R. 710).

A supply of birds was brought across the border in late February 1953, and left at Hadzima's house. Pursuant to Hadzima's private plan, the birds were stolen that night by petitioner Ballard and Pursselley (R. 718–720, 723–725, 728). The next morning Hadzima and Duke talked Spicuzza out of reporting the theft (R. 139–141). Duke received $600, which amounted to 10% of the proceeds, after the birds were sold (R. 729–730). It was this theft which led the partnership to give serious consideration to the notion of flying the birds in (R. 1494), but no immediate agreement was reached with Helm because of differences as to fees (R. 146, 1485–1488).[5]

In the meantime, Todd and Spicuzza went to Mexico City, collected a load of birds, and sent them north

[5] Duke had contacted Helm before this meeting, asked him to meet with the partners for the purpose of arranging smuggling flights, and instructed Helm to ask for $5,000 per trip (R. 1036–1037).

early in March, 1953, to a location just below the border (R. 147, 1488–1492). The birds were taken across the border in a truck. Once again, Hadzima had arranged to have the load of birds "hijacked" by Ballard and Pursselley (R. 739–740) and had notified Duke of his hijacking plan and promised him 10% of the proceeds (R. 747–749). After the birds were in this country being transported to Los Angeles, Ballard and Pursselley intercepted the truck, beat the driver, and took the birds (R. 759, 763–767).

After the second "hijacking", Spicuzza and the others concluded that only Hadzima could have "fingered these loads" (R. 151). They thereupon broke up the partnership (R. 153). Spicuzza communicated with Duke in order to contact Helm. On March 16, 1953, he hired Helm to fly in birds for the Spicuzza group at a price of $1,000–$1,500 per load (R. 153–154, 1043, 1045–1046). He advanced Helm $1,500–$2,000 to put toward the purchase of an airplane (R. 154, 1044, 1046). In the interim, Helm had privately promised to keep Duke informed as to each smuggling trip (R. 1041).

On March 31, 1953, Helm picked up a load of birds in Mexico and flew them across the border to Apple Valley, California, where Spicuzza and his partners met the plane with trucks to transport the birds to Los Angeles (R. 1050). In accordance with his prior promise, Helm had told Duke of the planned flight before it occurred (R. 1049). Duke passed the information on to Hadzima, at the same time arranging a division of the hoped-for spoils. Hadzima took Bal-

lard and Pursselley with him to the Apple Valley landing strip, intending to "hijack" the load (R. 779–780, 784), but the group failed to appear at the appropriate time (R. 781–782).

3. About two days later (early in April 1953), Helm went to San Diego, California, to confer with Duke. Since Duke was not in, Helm went to Buono's office, where he found Buono and Hadzima. Hadzima told Helm that he knew about the Apple Valley flight, that he intended to intercept Spicuzza's future shipments, and that he expected Helm's cooperation in the future (R. 783, 1052–1053).[6] A few minutes later, in the presence of Hadzima, Buono, Duke, and Pursselley, Helm agreed to go along with the "hijackers" (R. 785–786). It was further agreed to divide future profits equally among the five then present and Ballard (R. 787, 1057–1058). This conversation was the first overt act alleged in the conspiracy charged in count 4.

During the last week in April 1953, Spicuzza's group arranged with Helm for another importation of birds. The birds were to be picked up at El Americano, Mexico, on April 30, 1953, and delivered at Bowling Green, Kentucky, that night (R. 1057–1061). However, due to various circumstances, the birds were not brought in until May 13, 1953, when Helm transported them from Mexico to Desert Center, California (R. 1066–1080). In the meantime, Helm had kept Duke, Hadzima, Pursselley, Ballard, and Buono fully informed of the shifting plans, arrangements,

[6] This seems to have been the first time that Helm had heard of the "hijacking" arrangement.

and trips of Spicuzza's group (R. 1061, 1064, 1065, 1069, 1070, 1072, 1077–1078).

When Helm landed at Desert Center he knew that Hadzima, Ballard, and Pursselley were in the area "to pull off the hijack" (R. 1082). Therefore, Helm successfully "stalled" Spicuzza's group until the raiding party arrived and seized the birds (R. 1082–1085). During the course of the raid, after Helm had left in the airplane, Spicuzza was bound and brutally beaten by petitioner Ballard (R. 201–204, 206, 209, 1084). The birds were thereafter sold (R. 814, 1088, 1090). The Desert Center transaction resulted in the charges contained in counts 5 and 6.

About the beginning of June 1953, the participants in the "hijacking" scheme met at the Marlin Inn, San Diego, and divided the proceeds. Each share amounted to $1,750 (R. 839, 1090–1091, 1225–1226). However, Pursselley had gambled away $500 of the money Ballard had given him to give to Duke and Buono (R. 1090), and Hadzima and Ballard had to make up this deficiency (R. 831, 832, 835, 836). This led Hadzima and Ballard to conclude that they should conduct their future operations without Pursselley's aid, and the group agreed to dissolve (R. 840, 1091–1092).

4. The day after the Marlin Inn meeting, Ballard and Hadzima decided to go back to doing their own smuggling. They contacted Duke, agreed to pay him 10% of the proceeds, and ordered a supply of birds from Europe, to be consigned to Tijuana, Mexico (R. 841–846). During the period July 1953, to November 1954, Ballard and Hadzima smuggled 40–50 loads

of birds into this country from Mexico. The proceeds of the first shipment alone amounted to approximately $5,000. The sum realized from each shipment was divided as follows: Ballard received 45%, Hadzima 45%, and Duke 10% (R. 852–856). Duke earned his portion by advising Hadzima as to how best to forward money to Europe and the kind of story to be told in case of apprehension (R. 859).

5. Also in early June 1953, Helm met with Duke and Buono and explored the possibility of Helm continuing as a bird smuggler on his own. Helm believed it would be necessary to obtain another airplane, since the one previously used was by now too widely known. Buono offered to arrange the necessary financing with a Mr. Appel in Los Angeles (R. 1099–1101). Appel was contacted and on June 10, 1953, put up $2,500 toward the purchase of the aircraft Helm had in mind (R. 1103–1105). This was the start of the conspiracy alleged in count 7.

On June 5, 1953, Duke, Helm, Buono, Spicuzza, and Todd had met to discuss the bird business (R. 1105–1106). Duke and Buono assured Spicuzza and Todd that there would be no more "hijacking" if they resumed operation (R. 221–223, 1106–1107). The upshot was that Helm went ahead and purchased the new airplane to be used to smuggle birds for Spicuzza and Todd, and Buono financed a trip to Mexico City by Spicuzza and Todd to arrange for a shipment (R. 221–222, 225, 1107). Duke's idea was to "let Spicuzza go ahead and build up and we will knock him off again" (R. 1129).

On June 28, 1953, Helm and Spicuzza illegally transported a load of birds from Carbo, Mexico, to Fullerton Airport, near Los Angeles (R. 1112–1113, 1116; count 8). On July 7, 1953, Helm transported birds from Carbo to Las Vegas, New Mexico (R. 1117). On July 15, or 17, 1953, the Las Vegas routing was again utilized, and after this trip Spicuzza was able to repay the advances made by Appel and Buono to pay Helm (R. 1118–1119).

On August 6, 1953, Helm transported a small load of birds from Carbo, Mexico, to Las Vegas in a rented airplane (R. 1130).[7] On August 30 (count 9), September 17, and September 28, 1953 (count 10), three more loads were illegally brought in by Helm over the same route (R. 1130–1131).

In October, 1953, Spicuzza and Todd were tried for an earlier smuggling offense (R. 1284). In the latter part of November or early December, Spicuzza and Todd asked Helm to bring in more birds. Helm thereupon notified Mr. Vader of the Customs Service and a customs agent was waiting at the terminal point when the flight occurred (January 9 or 10, 1954) (R. 1279–1285). This appears to have been the actual termination of the conspiracy charged in count 7.

---

[7] On August 4, 1953, Helm flew down to San Diego to meet with Buono and Hadzima (R. 1120). Hadzima told Helm that he intended to "hijack" Spicuzza's next load (R. 1121). That very evening, when Helm landed at Los Angeles, the landing gear collapsed and considerable damage was done to the plane (R. 1121). Helm concluded that it had been tampered with (R. 1122–1124).

ARGUMENT

1. Both petitioners, Buono and Ballard, argue broadly that their convictions derived from a "mass trial". Specifically, petitioner Buono asserts that the allegedly separate conspiracies charged in the indictment actually constituted "but one conspiracy" and that therefore his acquittal on count 4 barred his conviction under count 7. Petitioner Ballard urges that it was prejudicial error to deny his pre-trial motion for severance since, as a result, he was subjected to a mass trial in which evidence was introduced on counts in which he was not named. Neither contention is valid. Three distinct although interrelated conspiracies were charged in the indictment. The first (January to April 1953; count 1) involved an illegal agreement between Duke and the Spicuzza-Hadzima partnership to smuggle psittacine birds into the United States from Mexico by airplane. These two petitioners were not involved therein.

The second unlawful agreement involved Buono, Ballard, Duke, Hadzima and Helm (April 1953 to December 1954; count 4), although Buono was not convicted thereon. Its purpose was to hijack birds from the Spicuzza group which had split with Hadzima on the belief that he had engineered prior hijackings. The scheme was for Helm to pretend to cooperate with the Spicuzza associates by continuing to pilot their illegal shipments and to keep the hijackers up to date on the illegal shipments. This agreement resulted in the successful hijacking which formed the basis of substantive counts 5 and 6 of which Ballard was convicted.

The third conspiracy (June to October, 1953; count 7) overlapped the second in time but not in objective. In this conspiracy, the Spicuzza group resumed operations under the prodding of Duke, who assured them that the hijacking would cease, and with funds provided by petitioner Buono for the purchase of another airplane. This new arrangement resulted in numerous illegal shipments of psittacine birds to this country which formed the basis of the substantive counts on which Buono was convicted.

Hence, although several conspiracies were tied together, they clearly did not involve "the common purpose of a single enterprise * * *". *Kotteakos* v. *United States,* 328 U. S. 750, 769. In fact, the conspiracies charged in counts 4 and 7, although they overlapped, were at cross purposes and "reciprocally distinguishable from and independent of each other * * *". *American Tobacco Co.* v. *United States,* 328 U. S. 781, 788; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226, n. 59. It was necessary and proper that they be separately alleged.

In *Kotteakos* v. *United States,* 328 U. S. 750, on which petitioners rely, the evidence established eight or more different conspiracies while only one was charged. The result was that the numerous defendants were tried "*en masse* for the conglomeration of distinct and separate offenses committed by others * * *." (*Kotteakos* at 775.) Here, on the other hand, the evil condemned in *Kotteakos* was avoided by segregating the related conspiracies into distinct and separate charges with the precautionary instruction that "[e]ach defendant is entitled to have

his case, as to each count of the indictment which names him, considered individually as to him" (R. 5059). And, since they were separate conspiracies, petitioner Buono's acquittal of the conspiracy charged in count 4, far from being incompatible with his conviction of the conspiracy charged in count 7, emphasizes that the jury carefully discriminated between the two illegal arrangements.[8]

Nevertheless, the three conspiracies while separate were so interrelated that it was proper to join them and try them together. The evidence as to the hijacking, for example, would have been unintelligible without proof of its background; and, similarly, the third conspiracy could be understood only in relation to the other two. Judge Weinberger therefore correctly held, in denying Ballard's motion for severance, that joinder was permitted in this case under Rule 8 (b) of the Federal Rules of Criminal Procedure which provides, in part, for joinder where there is participation "in the same series of acts or transactions constituting an offense or offenses". (See *United States* v. *Liss*, 137 F. 2d 995, 998 (C. A. 2), certiorari denied, 320 U. S. 773). Judge Weinberger pointed out that (R. 76–A):

> Inasmuch as the ends of justice require that the judge does not allow the jury to be confused, or at least attempts to do so, as to the evidence admissible against each defendant, it is reasonable to suppose that the judge who tries the case

[8] There was persuasive evidence that petitioner Buono participated in the conspiracy charged in count 7 in that he supplied the funds which enabled the Spicuzza group to resume its smuggling operations (*supra*, p. 10).

> will be able to look out for the interests of each of the defendants, * * *.

This supposition proved to be well founded for the trial judge charged the jury (R. 5059, 5076, 5093):

> Now, this case is not one in which there is a single defendant or a single charge. There are three defendants and there are ten individual charges. Each defendant is entitled to have his case, as to each count of the indictment which names him, considered individually as to him.
>
> * * * * *
>
> Each defendant, and the Government, are entitled to have each count and each defendant separately considered.
>
> * * * * *
>
> Mr. Ballard has raised some objection to having to stand trial here with the other two, because Mr. Ballard is named in only three counts. Of course, as to each defendant you will give that defendant the benefit of special, particular consideration of that defendant, as to the counts in which he is charged.

In the face of these instructions, to say that petitioner Ballard was subjected to a mass trial because jointly tried with two other defendants is to indulge in the type of unfounded speculation concerning jury capacity rejected by this Court in *Delli Paoli* v. *United States,* 352 U. S. 232, 242–243, and *Opper* v. *United States,* 348 U. S. 84, 94–95.

2. a. The conspiracy charged in count 4, naming petitioners, was alleged to have commenced in April, 1953, i. e., when Helm specifically agreed to cooperate

and the conspirators agreed to share proceeds (see Statement, *supra*). As noted in the Statement, there was evidence that before that formal agreement in February, 1953, Hadzima, although ostensibly working with Spicuzza, had arranged with Ballard and Pursselley to "hijack" birds. In this connection Deputy Sheriff Johnson of San Diego testified that about 4:10 a. m. in the morning of February 20, 1953, he and another police officer stopped a speeding pickup truck in the county of San Diego driven by petitioner Ballard which contained about 1600 parakeets; that thereupon another car travelling behind the truck stopped voluntarily and the driver got out and approached the officers and Ballard. This individual (later identified as Pursselley) was told to leave. The officers then notified the customs authorities who came out and placed Ballard in custody (R. 1513–1 0). There is no merit in Ballard's contention th t this evidence was prejudicial as to him because it was prior to the commencement of the conspiracy in which he was named. This was evidence of acts performed by Ballard himself which tended to explain the nature of the conspiracy which he joined. It was properly admissible for such purpose although performed before the conspiracy formally commenced, just as acts after the conspiracy had ended would have been proper for such purpose. See *Lutwak* v. *United States,* 344 U. S. 604, 617, 618. Additionally, these similar transactions were material on the issue of Ballard's intent to commit the precise offenses charged since they "tended to show a consistent pattern of conduct". *Nye &*

Nissen v. *United States,* 336 U. S. 613, 618; see also *United States* v. *Liss,* 137 F. 2d 995, 998 (C. A. 2), certiorari denied, 320 U. S. 773; 2 Wigmore, *Evidence* §§ 302–304, 370 (3rd ed. 1940.)

b. Hadzima testified that from July 1953 to November 1954, after Pursselley was dropped, he and petitioner Ballard smuggled 40–50 loads of birds into this country from Mexico and shared the proceeds from the sales of these illegal shipments with defendant Duke (*supra,* pp. 9–10). In other words, they decided to do their own smuggling rather than "hijack" birds smuggled by others. This was within the period covered in count 4. On the part of Ballard, Hadzima and Duke, who directly participated therein, it was a continuation of their original agreement in another form, with Pursselley and Buono not involved. Even if it be considered as a separate conspiracy, it was so related to the conspiracy in count 4 as to be admissible against them on the issue of intent.

Since Buono was not mentioned in this evidence and was acquitted on count 4, his claim of prejudice from such testimony is without foundation.

3. Petitioner Ballard claims that, although the evidence against him might constitute robbery within the territorial limits of California, there was no showing that he ever left the United States, took part in the actual smuggling, or otherwise violated federal law.

However, the success of the conspiracy in which Ballard was involved was dependent upon the success of the Spicuzza smuggling operation. Petitioner Ballard was obviously well aware that the conspiracy

which he joined required that Duke and Helm engage in the smuggling of birds with the others, so that there would be birds to "hijack". This made him a co-conspirator in a conspiracy to smuggle. See *Direct Sales Co.* v. *United States,* 319 U. S. 703, 711. Having himself thus promoted such illegal venture, the acts of his co-partners, who were directly involved in the smuggling (e. g., Helm) as part of the ultimate plan to carry out the hijacking, are chargeable against him. *Fiswick* v. *United States,* 329 U. S. 211, 217; *Pinkerton* v. *United States,* 328 U. S. 640, 646–647.

4. Petitioner Ballard also contends that his conviction cannot stand since it is based on the testimony of accomplices. This argument has no merit. As this Court stated in *Caminetti* v. *United States,* 242 U. S. 470, 495, although accomplice testimony should be received with caution, "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." See also, *Nilva* v. *United States,* 212 F. 2d 115 (C. A. 8), certiorari denied, 348 U. S. 825; *Catrino* v. *United States,* 176 F. 2d 884 (C. A. 9); *United States* v. *Schwartz,* 150 F. 2d 627 (C. A. 2), certiorari denied, 326 U. S. 757. The trial judge here charged in accord with these principles (R. 5090):

> There is a rule regarding the testimony of accomplices. It is that a conviction may be had upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt that the testimony of the accomplice is true and that it establishes the commission of the offense.

As to the care with which such testimony should be viewed, the court further charged (R. 5090):

> However, the testimony of all accomplices is to be very cautiously received and very carefully scrutinized because of the position which that accomplice has in his former relations or claimed relations with the persons against whom he testifies, so you must carefully examine it and be very cautious about it. But if you do accept it, find that it is corrobrated, or even if it isn't corroborated, if you believe it—of course, if you believe it you accept it—but in determining whether you believe it, I would urgently suggest to you that you check the other evidence to see what extent, if at all, the testimony of the accomplices is corroborated by other persons, by circumstance, by physical facts, by all other evidence in the case.

See also R. 5091–5092.

5. During the cross-examination of Helm, Duke asked a question concerning Helm's activities on July 30, 1955, a few days before the trial and long after the period charged in the indictment. In answer to an objection by the government, Duke said that he intended to show that on that day Helm had been caught smuggling and had made disclosures to customs officials about the events involved in the trial as part of a deal (R. 1323–1327). The judge ruled that he would allow proof as to smuggling (R. 1327). Helm testified that on July 30, while transporting liquor from California to Mexico, his plane crashed just over the Mexican border; that he thereupon returned to the United States by foot and called Mr. Vader of the Customs Service who picked him up

(R. 1325–1335). Helm maintained that this flight was legal, that it was cleared through customs, and that he had a manifest. The manifest was produced in court (R. 1326, 1330, 1331). In the course of this examination, the court observed (R. 1332):

> The point that counsel was going to make was that this man was smuggling, * * *.
>
> He says he had a manifest and he cleared. *Now if you have evidence that it was not so, you may introduce that evidence.* [Emphasis added.]

Subsequently, on cross-examination by Ballard's attorney, Helm testified that he discussed with Vader his participation in the events charged in the indictment and that this was his first complete statement regarding Buono and Duke (R. 1406–1407).[9] Thereafter, Duke tried to introduce a newspaper account of the July 30 crash, which the judge rejected as improper evidence (R. 1460–1462).

Buono's contention that this ruling prevented him from showing that Helm's account to Vader was "inspired" by Helm's belief that he would immunize himself from prosecution for smuggling on July 30, 1955, is thus without foundation. While the judge did not permit Duke to go into collateral details, such as the length of time Helm had been working for his then employer, the judge throughout adhered to his initial ruling that the defendants would be allowed, if they could, to prove that Helm was smuggling on July 30. Helm was in fact subjected to an exhaustive

[9] He had previously given Mr. Vader two or three statements concerning the smuggling operations (R. 1407).

cross-examination (R. 1132–1413, 1447–1477) during the course of which his credibility was repeatedly challenged (see e. g., R. 1280–1300, 1301, 1303–1305, 1320–1321).

Additionally, the jury was made acutely aware of the necessity that Helm's testimony be scrupulously examined, for the judge charged (Tr. 5085–5086):

> In determining the credibility of certain witnesses called by the government you may take into consideration motives for false accusations, as well as bias, if any there be * * *.
>
> If you find from the evidence that such witness shows a belief or even only a hope that he will secure immunity from prosecution or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis for any act or word of the United States Attorney for such belief or hope, such state of mind on the part of such witness is a matter for your consideration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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